In the High Court of Uttaranchal at Nainital

Chapter VIII, Rule 32 (2) (b)
Description of Case.

W.P. No. 787 of 2002 (M/S)
M/s Ram Lal Brothers and another
Vs.
District Judge, Nainital and others.

AND
W.P. No. 1023/2002(M/S)

Sri Neeraj Shah

Vs.
M/S Ram Lal Brothers and others.

Date of decision: 10-9-2004

For the approval of:

Hon'ble Mr. Justice Irshad Hussain, J.

- Whether the order/judgment should be Sent to the reporters for reporting? (Yes)

- Whether the reporter be allowed to See the judgment? (Yes)

ISB

In the High Court of Uttaranchal at Nainital

W.P. No. 787 (M/B) of 2002

1- M/s Ram Lal Brothers,
Bara Bazar, Mallital, Nainital.

2- Sri Shyam Tandon
R/o Golghar, Mallital, Nainital ..Petitioners.

Vs

District Judge, Nainital and others .. Respondents.

AND

W.P. No. 1023 /2002(M/S)

Sri Neeraj Shah S/o Narendra Lal Shah
R/o Goalghar Mallital, Nainital ..Petitioner

Vs.

M/S Ram Lal Brothers and others ..Respondents.

Sri B.C. Pande, Senior Advocate, learned counsel For tenant.

Sri Alok Singh, Senior Advocate, learned counsel for Landlord.

Dated: 10-09-2004

Hon'ble Irshad Hussain, J.

Both these writ petitions under Article 227 of the Constitution of India, the first by the tenant and the second by the landlord arise out of the proceedings for release of a shop under section 21(1)(a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (for short 'Act 13 of 1972').

2- The shop in question situate in a big house known as 'Goalghar', Mallital Nainital bearing Municipal nos. 383 to 386 and basement no. 343 was let-out more than 50 years ago by Sri Narendra Lal Shah Jagati, the father of the present landlord, Sri Neeraj Shah. Sri Neeraj Shah moved application for release of the shop on the ground that the same is bonafidely required by him for starting a departmental store he is not permanently settled in any occupation or business except that he has property income. He also

alleged that the tenant had also set up his other business by the name and style M/s Himalayan Wools at Almora and also a shop in the same name and style in a portion of Capital Cinema, at Nainital and that therefore, the tenant will not suffer any hardship in the event of release of the shop.

3- The application for release was contested on the ground that the applicant's need for setting up departmental store is not genuine engaged in the work of construction of buildings and also transport business; that the landlord has recently let out shop in the same house to a tenant; that the applicant maintain a car and has enormous income from property worth millions; that the tenant has not started any business in the name and style as Himalayan Woolens in Nainital; that woolen factory situated at Almora belong to the tenant and its product is sold in the shop in question and that in the event of release of the shop the tenant's business will be ruined and they will suffer irreparable hardship.

4- Both the sides filed the evidence in support of their respective contentions. The learned Prescribed Authority, Nainital by its judgment and order dated 20-2-2002 allowed the release application holding that the need of the appellant was real and bonafide and further that the landlord would suffer greater hardship in case of rejection of the release application than would be suffered by the tenant in case the release application was allowed. The tenant filed an appeal under section 22 of the 'Act 13 of 1972' which was registered as rent control appeal no. 02/2002. During the pendency of the appeal the tenant filed an application dated 23-9-2002, under Order 6 Rule 17 Code of Civil Procedure read with Rule 22 (d) framed under the said 'Act 13 of 1972'. By the said application of amendment the plea was sought to be raised that during the pendency of the release application the landlord has let out large premises of the same building to 'Kaleer Gas Service' distributor of L.P.G. Cylinders; another premises to 'Raghav Pathology; and that the conduct of the landlord shows that he is in no need of the premises in question and want to sell the same or let out the premises in question to some other person at much higher

rent. The appellate authority rejected the said application the same day. Another application was also filed by the tenant before the appellate authority on the same day i.e. 23-9-2002 purporting to be one under Order 41 Rule 27 of the Code of Civil Procedure for leave to file additional evidence pertaining to the premises let out during the pendency of the appeal. This application was also rejected by observing that it is not stage to adduce evidence as sufficient opportunity already availed by the parties. The appellate authority however on the basis of its appreciation of the facts and evidence opined that the learned Prescribed Authority has not erred in holding the need of the landlord to be bonafide. While considering the comparative hardship the appellate authority observed that keeping in view the hardship of both the parties and the interest of justice only two shops bearing nos. 385 and 386 are released in favour of the landlord for starting his business and in this way the appeal was partly allowed.

5- Aggrieved, both the tenant and the landlord filed these writ petitions. Learned counsel for the tenant argued that perusal of the judgments of the authorities below indicate patent error as they have mainly dwelt upon the question of ownership of hotel Armdale although a specific case has been set up that the landlord is engaged in running the said hotel and his need for setting up of a departmental store in the shop in question is not genuine and bonafide. Learned counsel also submitted that the authorities below mis-read the evidence and recorded perverse findings in regard to the bonafide need of the landlord and also with regard to the comparative hardship of the parties.

6- On the other hand learned counsel for the landlord submitted that there is no apparent error on the record which may give cause for interference in exercise of writ jurisdiction as regards the finding of facts with regard to bonafide need and comparative hardship and further that the error apparent is in the judgment of appellate authority to the extent that part of the shop only has been found to be sufficient for requirement of the establishment of the business of the landlord.

7- Basically the findings with regard to the bonafide need and comparative hardship are findings of fact. It is now well settled that in exercise of writ jurisdiction findings of fact can be interfered with only if the error is self evident and further that by the error grave injustice or gross failure of justice has occasioned. At the out set reference may be made to the recent decision of the Apex Court in **Ranjeet Singh vs. Ravi Prakash; (2004) 3 Supreme Court Cases 682** wherein relying on earlier decision of the Court in **Surya Dev Rai vs. Ram Chander Rai and others; (2003) 5 Supreme Court Cases 675** it has been stressed that only a patent error which does not require establishment by lengthy and complicated arguments or by long drawn process of reasoning is amenable to certiorari of supervisory jurisdiction. Learned counsel for the landlord placed reliance on the reported decision. In this background the findings of fact as recorded by the authorities below need to be considered in exercise of the supervisory jurisdiction vested in the court.

8- The foremost objection to the release application raised by the tenant is that the landlord is engaged in not only running Armdale hotel but also does construction work of the buildings and also carry on transport business. The landlord gave evidence that the truck owned by him had been sold out and that due to restriction on constructions of buildings in Nainital, he has also ceased to carry on the said business. By virtue of family settlement dated 4.12.1974 (paper no. 53-c) large number of properties and assets were partitioned among the father, mother, grand-mother and two brothers of the landlord Sri Neeraj Shah, who had been given the house known as ‘Goalghar’ of which the shop in question is one of the portion. The property known as Armdale and also Armdale hotel are owned by landlord’s mother Smt. Premwati Shah. Although the tenant came up with the plea that the family settlement was a sham transaction and that it was so made for taxation purposes, I need not enter into these controversies and it will be sufficient to confine to the defence set up that the landlord is engaged in the running of hotel Armdale and his alleged need to

set up a departmental store in the shop in question is not bonafide and genuine.

9- Nainital occupies a prominent place in the tourist map of the country and this is the reason that not only the tourists from within the country but large number of foreigners also visit this place. To accommodate the large inflow of the tourists etc there are about 100 hotels in Nainital as is also evident from the perusal of the directory of hotels and restaurants (paper no. 150-c) filed on record by the tenant and hotel Armdale is one of them. With the increase in the population and other commercial activities the hotel business has now become more lucrative almost round the year as compared to the seasonal business which use to be during the summers only in the past. Therefore, running a hotel in this tourist town is a permanent engagement. Considering these peculiar aspects of the matter it need to be seen whether there is patent error or not in the relevant finding of the Prescribed Authority recorded as below:-

> " होटल के व्यवसाय के संबध में मात्र यही साक्ष्य के आधार पर निष्कर्षित है कि प्रार्थी अपनी माता के व्यवसाय में मात्र उन्हें सहायता पहुॅचाता है अथवा अन्यथा लाभ लेने के उद्वेष्य से जुडा हो सकता है। परन्तु यह उसके स्वयं के रोजगार तथा परिवार के पालन–परवरिश का पर्याप्त आधार नहीं है। उसकी स्वयं की प्रतिष्ठा एवं पत्नी तथा दो बच्चों की सही परवरिश के लिये उसकी अपनी स्वयं की सम्पति से विधिनुरूप इस तरह रोजगार प्राप्त हो सके, प्रार्थी को स्वयं रोजगार करने का अधिकार प्राप्त है।"

10- There can be no doubt that every person has a right to establish himself in some occupation but the above vague finding of the Prescribed Authority that the landlord may only be assisting his mother in running of the hotel business or may be attached to it to earn some benefit speak of an apparent error on account of non-consideration of vital aspect of the matter and material on record.

11- In the various affidavits of the tenant and his witness Subhash Nagpal, a neighbor of the shop in question, there is clear and categorical averment that Sri Neeraj Shah not only runs the hotel Armdale but also reside there permanently whereas the parents of Sri Neeraj Shah reside in his house known as 'Goalghar'

of which the shop in question is a portion. Sri Narendra Shah Jagati, the father of the landlord is not more than 80 years old and whereas the mother Smt. Premwati Shah is also about 75 years old as is evident from their affidavits. Both of them reside in the above house of the landlord whereas the brother Sri Deepak Shah reside separately as also appear to be the case of third brother Sri Ajay Shah. It is thus evident that the two brothers of the landlord appear to be fully separated from their parents and the landlord only is looking-after them, their properties and business interests and both of whom also reside in his house 'Goalghar'. Both mother and father of the landlord in their affidavits urged that the landlord only assist in the running of the Armdale hotel owned by his mother. No such assistance had ever been attribute to other two sons by them. The tenant brought on record documents per list 123-C to show that the name of the landlord Sri Neeraj Shah find place in the Nagar Palika Parishad, Nainital's tax records against hotel Armdale and its properties. The extracts for the year 1988-89 (per no. 125-C); for the year 1995-96 (paper no. 126-C); for the year 1997-98 (paper no. 127-C) and extract of scavenging tax for the year 1995-96 (paper no. 134-C) clearly indicate the entries of the name of the landlord as occupant of the said hotel and its properties. Other extracts paper nos. 129-C, 130-C, 131-C, 132-C, 132-C/1, 132-C/2, 132-C/3, 132-C/4 and 132-C pertain to other occupants of the tenements situate in the compound of the hotel Armdale and different occupants in various tenements have been shown in the records of the Nagar Palika Parishad, Nainital. The entries in the tax register is a fiscal measure which also verify the name of the occupants of the particular building. The various entries thus clearly indicate that the landlord Sri Neeraj Shah has been occupying not only hotel Armdale but its other properties and this aspect fully support the claim of the tenant that the landlord reside permanently there as he has to run and manage hotel Armdale and its other properties. The learned Prescribed Authority and also the learned Appellate Authority failed to take into account this important aspect of the matter and they dwelt mainly upon the ownership of the

Armdale hotel which in the peculiar circumstances of the case has no material effect on the controversy in this case.

12- There is another piece of evidence to support the above inference. It is the copy of the extract of the particulars of a Maruti Car owned by the landlord. The Registering Authority (Motor Vehicles) , Kathgodam reported in the extract (paper no. 76-c) that Sri Neeraj Shah is the registered owner of the Maruti Case having registration no. U.P.02/A-9922 and residential address of Sri Neeraj Shah has been shown as hotel Armdale, Nainital. This extract of the particulars was delivered by the authority in the year 1994 and from the documents on record it is evident that when the application for release was filed even at that time the landlord was residing at hotel Armdale and this was so because he was running the said hotel which is full time engagement considering the special situation of the town of Nainital and it can safely be said that he can not spare time to run a departmental store. There is thus patent error in the judgment of the Prescribed Authority which did not consider the above material and board aspects of the case and felt content mainly with the inference that the landlord's mother being the owner of Armdale hotel running of the same by the landlord would not be a source of livelihood for the landlord and his family with reference to certain papers filed to show the ownership of the said property.

13- It need to be stated that as argued by the learned counsel for the tenant the approach of the learned appellate authority was also not different and the finding of fact recorded by it is also based on non consideration of vital aspects of the matter and which therefore exhibit patent error. The learned Appellate Authority referred to the papers placed on record by the parties and thereafter went on to observe in the judgment as under:-

> " It is contended on behalf of the appellant that since Neeraj Sah is doing the hotel business by running the Armdale Hotel, as such his need can not be said to be genuine. I do not see much force in the contention; of the reason that the said hotel as discussed above, belongs to Smt. Premwati Sah and not to his son Neeraj Sah. This fact is corroborated from the

copy of judgment of the income-tax Appellate Tribunal which pertains to the year 1989-90 paper no. 95-c, in which Premwati Sah has been mentioned as owner of the said hotel. Not only this, the electricity bill paper no. 100-c, and the receipts of the municipal taxes paper no. 101-c, all documents show that it is Premwati Sah, mother of the present landlord who is owner of said hotel. In Lal Bahadur Jauhari vs. VI A.D.J. 1998(2) ARC page-400, it is clearly held that merely for the reason that a son sits in the shop of his father, is by itself, is not sufficient to hold that he is engaged in the business. Therefore, in my opinion, learned trial court has not erred in holding the need of landlord to be bonafide."

14- From above it is evident that like the Prescribed Authority stress has been laid on the issue of ownership of Armdale hotel without considering the vital evidence and important aspects of the matter that the landlord not only reside in the Armdale hotel but is also fully engaged in running the same. As stated in the earlier part of the judgment the running of the hotel in Nainital is a full time job and this is the reason the Sri Neeraj Shah has to reside with family there in the premises of the hotel itself. It is not a case in which a son merely sits in the shop of his father or merely assist in the business as referred to by the learned Appellate Authority but the material on record indicate that Sri Neeraj Shah is fully engaged in running the Armadale hotel and it is not a mere case of assistance to his mother in the said business. This was the reason that his name alongwith his mother's name came to be placed bonafidely in the directory of hotels and restaurants of Nainital (paper no.1 56-c) in the column of name of proprietor/ partner/director of the hotel Armdale.

15- It also need to be mentioned here that the landlord in paragraph- 5 of the writ petition admitted to have let out some commercial portions of the same house to different tenants which according to him were not suitable to set up departmental store. It is common knowledge that departmental store these days are run in the buildings having separate floors considering the separate areas

and floors earmarked for particular variety of consumer goods. The portions let out to three tenants during the pendency of the proceedings by the landlord are on different floors of the same house but are towards on one side of the house and if the landlord was really interested to set up a departmental store these portions could have been utilized. No doubt a landlord has his own choice to set up a particular type of business in a particular accommodation but the peculiar aspects of the case and the facts apparent clearly lead to an inescapable inference that since the landlord was fully engaged in running the Armdale hotel fruitfully he was not at all interested in stating the departmental store and as such his need is not real, sincere and honest but on the pretest of engaging himself in the said business , he want to have the tenant evicted for ulterior motive. The inference is lent credence to by the landlord's own pleading in paragraph no.4 of the release application. It was pleaded that the landlord has asked the tenant to vacate the shop but no heed was paid whereupon eviction suit no. 6/1990 was filed against the tenant on the ground of sub-letting by the tenant. Finding that the said suit was not being decided soon, he preferred to file the present application for eviction of the tenant by release of the shop in dispute in his favour on the ground of bonafide requirement for own use. In my view the landlord wanted to have the shop vacated by one way or the other although his need is not real, bonafide and genuine as he is fully engaged in running the Armdale hotel.

16- For the reasons aforesaid the finding of fact with regard to the bonafide need suffers from patent error which need interference in exercise of the writ jurisdiction of the Court. On the face of the facts of the case I see no merit in the argument of the learned counsel for the landlord that since the hotel Armdale is owned by the mother of the landlord, the need of the landlord to occupy the tenanted shop is bonafide and genuine and the findings of fact as recorded by the authorities below can not be interfered with in the writ jurisdiction of the Court. Consequently the decisions of the Apex Court in **Shiv Sarup Gupta vs. Dr. Mahesh Chand Gupta; (1999) 6 Supreme Court Cases 222** and in the matter of

Dattatraya Laxman Kamble vs. Abdul Rasul Moulali Kotkunde and another; (1999) 4 Supreme Court Cases 1 relied upon by the learned counsel have no application here. In both these matters on the facts of the cases the requirement of the landlords were found bonafide, natural, real and sincere and therefore the findings of fact recorded by the authorities below were not disturbed.

17- Coming to comparative hardship as contemplated by the provision of rule 16(2) of the Rules framed under the Act 13 of 1972 it need to be stated that the question in view of the above conclusion loses its significance. Even otherwise I can not lose signt of the fact that the tenant is running business in the shop in question for the last more than 50 years and as pleaded in paragraph no. 10 of the written statement the business in the name and style M/s Ram Lal Brothers is of Hindu undivided family which will suffer irreparable hardship if evicted from the tenanted shop. It may also be pointed out here that considering the factual aspect of the case the learned Appellant Authority made an error in forming an opinion that in the event of hardship of the landlord shop nos. 385 and 386 can be released in favour of the landlord and that shop nos. 383 and 384 along with basement go down no. 343 may be permitted to be retained by the tenant. It does not stand to reason as to how such a proposition came to be considered when it is a specific case of the landlord that the shop in dispute is a single unit although it bears these municipal numbers and as such the shop as one single unit has been described at the foot of the release application. The landlord Sri Neeraj Shah also made an averment to this effect in his affidavit (paper no. 53-c) that it is a single unit un-partitioned shop at the spot having distinct municipal numbers. Therefore the division in the manner as suggested was not feasible. Strangely enough it is also mentioned that the counsel for the tenant also agreed to this proposition. It appear to be a case of patent error because as held by the Apex Court in the matter of **Sri Swamy Krishnanand Govindanand vs. M/s M.A. Oswal Hosiery (Regd.); 2002 A.I.R. S.C.W. 928** a compromise like a contract postulates consensus between two parties and any statement of a counsel cannot be termed as a compromise.

18- At any rate the finding of fact as to the comparative hardship as recorded by the authorities below also suffers from vice of patent error which can not be legally maintained.

19- For the reasons aforesaid and in view of the findings of fact as recorded by the authorities below being bases on non-consideration of vital aspects of the matter and being perverse grave injustice has occasioned to the tenant and the findings are therefore liable to be set aside. Since the need of the landlord has not been found to be bonafide and genuine the release application filed under section 21 (1)(a) of the Act 13 of 1972 is liable to be dismissed.

20- Writ petition No. 1023/2002(M/S) filed by the landlord Sri Neeraj Shah is hereby dismissed. Writ Petition No. 787/2002 (M/S) filed by the tenant is allowed and by setting aside the judgment and order dated 20-2-2002 passed by the learned Prescribed Authority, Nainital and the judgment and order dated 24-9-2002 passed by the learned Appellate Authority/District Judge, Nainital in appeal under section 22 of the Act 13 of 1972, the application, for release of the shop in dispute, under section 21 (1)(a) of the U.P. Act No. 13 of 1972 is hereby dismissed. No order as to costs.

(Irshad Hussain, J.)

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